

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1451

To be argued by
DON D. BUCHWALD

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1451

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES P. FLYNN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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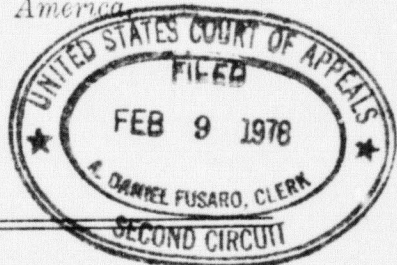


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**United States Court of Appeals
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Docket No. 77-1451

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES P. FLYNN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James P. Flynn appeals from a judgment of conviction entered on November 29, 1977 in the United States District Court for the Southern District of New York, after an eight-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment S 74 Cr. 336, filed April 3, 1974, charged Flynn and co-defendant Richard T. Ford* with the October 20, 1971 \$203,938.00 bank robbery of the Orange

* Flynn became a fugitive shortly after the filing of the indictment and was not apprehended until February 14, 1977. Co-defendant Ford was tried and convicted on all four counts of the indictment in September, 1975. Ford's conviction was overturned by this Court under the Interstate Agreement on Detainers. *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3214 (October 3, 1977).

County Trust Company in Middletown, New York in violation of Title 18, United States Code, Section 2113(a) (Count Three); using firearms to commit the robbery in violation of Title 18, United States Code, Section 924(c) (1) (Count Four); transporting a stolen automobile from Boston, Massachusetts to Middletown two days prior to the robbery in violation of Title 18, United States Code, Sections 2312 and 2 (Count Two); and conspiracy to commit the above offenses in violation of Title 18, United States Code, Section 371 (Count One).

Trial commenced on May 11, 1977 and concluded on May 23, 1977 when the jury returned a guilty verdict on the conspiracy and Dyer Act Counts (One and Two) and acquitted on the bank robbery and gun counts (Three and Four).

On November 29, 1977, Judge Motley sentenced Flynn to imprisonment for five years on Count One and three years consecutively on Count Two for a total of eight years. Flynn is presently serving his sentence.

Statement of Facts

A. The Government's Case

1. Synopsis

The Government established that on October 20, 1971 the defendant James Flynn and two others—Richard Ford and a third person—stole \$203,938.00 from the Orange County Trust Company. Following the armed bank robbery, Flynn and his accomplices fled in a stolen beige Plymouth. They eventually abandoned that car and got into a blue Plymouth which had been stolen in Boston, Massachusetts two days before the bank robbery. Following an extensive investigation, Flynn was indicted on

April 3, 1974. Flynn immediately became a fugitive until February 1977 when he was apprehended

2. The Middletown Robbery Investigation

On Wednesday, October 20, 1971, at approximately 11:15 a.m., three armed masked men entered the FDIC-insured Silver Lake Branch of the Orange County Trust Company, (the "bank"), located at the corner of Route 211 and Fitzgerald Drive, across the street from Lloyd's Department Store in Middletown, New York. (Tr. 158-62, 190-92, 216-17, 230-31, 243-44; GX 1, 5K, 5JJ).^{*} Bank employees had previously packaged \$190,000 in denominations of five, ten, twenty, fifty and hundred dollar bills in two federal reserve bags for pick-up by armed Brink's guards for delivery to the Federal Reserve in New York City. Such pick-ups of excess monies by Brink's routinely occurred on Wednesdays at mid-day. (Tr. 194-202, 215-16; GX 2A, 3).

The robbers, aware of the Wednesday Brink's pick-up procedure, demanded the bags. Within moments, they left the bank with the two bags containing \$190,000.00 and approximately \$14,000 in cash removed from one cash register. (Tr. 181, 194-96, 217).^{**} There were no surveillance cameras in the bank and none of the masked robbers could be identified by bank customers or employees. (Tr. 194).^{***}

^{*} Page references with the prefix "A." refer to the Appellant's Appendix. "Tr." refers to Trial Transcript; "GX" refers to the Government Exhibits at trial; "Br." refers to Appellant's Brief.

^{**} The money was never recovered. (Tr. 195).

^{***} One of the robbers carried a shotgun. He was described as older and shorter than the others, approximately 5' 8". (Tr. 164, 178, 220). The other two carried handguns and were both approximately six feet tall (Tr. 163-64, 170, 218, 227), the height of defendants Ford (GXs 39, 40B, 105, 109) and Flynn (Tr. 100; GX .83C).

The robbers fled from the bank in a 1972 beige Plymouth which had been stolen in the early morning hours of October 19, 1971 (the previous day) from Stanley Plymouth and Chrysler Dealer in Warwick, New York (Tr. 263, 274-75; GX 42A, 72-1, D, E, F, G, 72-14), approximately 14 miles from Middletown. (Tr. 845).

Approximately a half-mile from the bank, along Fitzgerald Road, the beige Plymouth passed Ms. Angela Whooley, a registered nurse who was walking home toward her apartment. (Tr. 235-36, 298-301; GX 5KK, 13C). She observed three men in the car (two in the front seat), getting a good look at only the driver and rear seat passenger. (Tr. 301-306, 347). Two weeks after the robbery, Ms. Whooley picked co-defendant Ford's photograph (GX 9-3A) from a photospread as the driver. (Tr. 306-9, 312-14, 356-366; GX 10). Ms. Whooley failed, however, to recognize a photograph of Flynn contained in the same photospread. (Tr. 330, 350-52; GX 9-2A).*

After crossing Route 211, the beige Plymouth proceeded to the parking lot of the Middletown High School **

* Ms. Whooley also identified co-defendant Ford as the driver at Ford's trial in September, 1975. (Tr. 315-16). The jury in the instant case was made aware that Ford had been separately tried in September, 1975 but, of course, was not informed of the verdict. (Tr. 463, 1033-34).

** The beige Plymouth was recovered in the high school parking lot. (GX 5aa, 5dd, 5ii, 5ll, 72-1F, 72-1G). It contained a Halloween mask (GX 72-3) and checkered overcoat (GX 72-2) which were identified by bank employees as having been worn by the man with the shotgun. (Tr. 165-66, 219, 258-61). Shotgun bullets (GX 72-5a-d) were found in the pocket of the overcoat. (Tr. 259). Human head-hairs found among vacuum sweepings taken from the beige Plymouth were mounted in slides by FBI laboratory technicians for future comparison purposes. (Tr. 261-

[Footnote continued on following page]

where the three robbers switched into a blue 1971 Plymouth (the "blue Plymouth") which had been stolen two days earlier from Hertz Rent-A-Car at Logan airport in Boston, Massachusetts. (Tr. 269-74, 373-75; GX 71-4, 71-11).^{*} The blue Plymouth, with three occupants, was observed leaving the parking lot by Thomas McCoy, a high school student. (Tr. 373-77).

McCoy identified Flynn at trial as resembling the driver of the second car, the blue Plymouth, which had left the High School parking lot. (Tr. 388).^{**} At the Ford trial, in September, 1975, however, McCoy initially had identified Ford as the driver of the same car, and thereafter, upon being recalled as a witness, had recanted his in-court identification. (Tr. 397-405).

The three bank robbers drove the blue Plymouth to the Acme Shopping Center in Middletown where they

62, 831-33; GX 45, 46, 72-7). The car bore New Jersey license plate PCP784 (GX 72-6), stolen from yet another automobile two days previously in Hackensack, New Jersey. (Tr. 255; GX 72-13). A bank employee who had observed the beige Plymouth speed away from the bank had furnished the police with New Jersey license number TPF784. (Tr. 193-94, 233-34, 245-46).

^{*} The blue Plymouth was the subject of the Dyer Act count of the indictment.

^{**} On the day of the robbery, McCoy described the driver of the blue Plymouth (the occupant closest to McCoy) to interviewing agents as having blond hair and blue eyes. (Tr. 390-91). This description matched that of Flynn (Tr. 101; GX 29A), but not Ford, who had dark hair and brown eyes. (GX 40A). Two months later, in January of 1972, McCoy mis-identified Ronald Christopher, a Middletown businessman, as the driver of the car he had seen. (Tr. 394-96). Christopher, who had blond hair and blue eyes, bore a close resemblance to Flynn. Christopher appeared at the trial. (Tr. 396, 434-40). 1971 photographs of Christopher were in evidence (GX 16-1 to 16-5) as was a 1974 photograph of Flynn. (GX 29A).

switched to another vehicle and made their final getaway. (Tr. 264-274; GX 5BB, 5EE, 5FF, 71-1D, 71-1E).*

3. The License Plate Connection

The blue Plymouth, which Flynn and the other robbers had used was stolen from Logan Airport on October 18, 1971, two days before the robbery, and bore Massachusetts license plates 439-65F. (GX 71-3A, 3B, 71-11). At approximately 10:00 p.m. on the evening of October 18, 1971, a man listing his name and address as "Robert P. Barry, 25 Lynn Shore Drive, Lynn, Massachusetts" ** registered for a party of two in Room 123 of the Holiday Inn in Middletown listing the make of his car as "Plymouth" and his license as "Mass. 439-65F". The motel registration and invoice (GX 17, 18, 19) were found by the state police on November 2, 1971 (Tr. 512-17) and on the same day a latent fingerprint of James P. Flynn was lifted from Room 123. (Tr. 575-607; GX 26-3, 27, 28). There was no registration at the Middletown Holiday Inn in Flynn's own name for the entire month of October, 1971. (Tr. 516-17, 847-48; GX 43).

* The Hertz Rent-A-Car registration was found in the glove compartment of the blue Plymouth (Tr. 268, 273-74; GX 71-4). This car also bore a stolen license plate, NY 4132AZ (Tr. 267; GX 71-2, 71-1D). McCoy had written down license number "NY 413292" and furnished it to the police. (Tr. 383). The two stolen license plates found respectively on the beige Plymouth and the blue Plymouth had been removed a few days previously from cars parked next to one another in a lot outside Bloomingdale's Department Store in Hackensack, New Jersey (GX 71-12, stipulated testimony of Edward Revere; GX 72-13, stipulated testimony of Edwin Hirning). Also found in the trunk of the blue Plymouth were its original Massachusetts license plates. (Tr. 268; GX 71-3A, 3B).

** The name and address proved to be fictitious. (Tr. 217-18, 223; GX 20, stipulated testimony of postmaster of Lynn, Massachusetts).

4. The Telephone Calls Connection

No telephone calls were made from Room 123 on the evening of October 18, 1971. (Tr. 849; GX 44D). Sometime between 9:00 p.m. and 10:00 p.m. on that evening, however, a call was made from a pay telephone in the lobby of the Holiday Inn to James P. Flynn's telephone number in Dorchester, Massachusetts. (Tr. 527-41, 554-55; GX 21A, 22, 23, 24, 25).

Sometime between 11:00 p.m. and midnight on the same evening, after "Robert P. Barry's" arrival, another one minute telephone call was made from the pay telephone in the Holiday Inn lobby to the telephone number of Rod and Arlene Weaver in Greenwood Lake, New York, Ford's next door neighbors. (Tr. 543, 716; GX 21A).*

Additional telephone records established that at 10:06 a.m. on Thursday, October 21, 1971 (the morning after the robbery), Flynn made a collect telephone call from a telephone booth in New London, Connecticut to his home telephone in Dorchester, Massachusetts. (Tr. 555-70; GX 23, 25).

* Later that night the beige Plymouth was stolen from Stanley Plymouth & Chrysler in Warwick on the route between Middletown and Greenwood Lake (GX 72-14, stipulated testimony of Richard Littell) where Ford and his wife, Ellen, lived under the aliases of Vincent and Natasha Thomas. (Tr. 711-15). The Weavers and the "Thomas's" were next door neighbors. (Tr. 713-14). Lacking any telephone of their own, the Thomas's would call one another on the Weaver's phone. (Tr. 715-16, 747-54). Arlene Pina (formerly Weaver) (Tr. 708, 710) testified at trial that "Vincent Thomas"—the co-defendant Ford—called sometime after 11:00 p.m. one evening but terminated the call quickly after being told (by Arlene Weaver) that Natasha had gone to bed. (Tr. 718-19). Arlene Pina placed this call as having been received on either the Monday or the Thursday following the Weaver's return from their honeymoon, which was on Saturday, October 16, 1971. (Tr. 718-21). The following Monday was October 18th.

5. The Greenwood Lake Investigation

In mid-September, 1971, one month before the bank robbery, Ford and his wife Ellen, moved into an apartment in Greenwood Lake, New York, above Sugar's Delicatessen, owned by Harry Saksenberg, next door to a cottage rented by Rod and Arlene Weaver. (Tr. 48-52, 709, 713-14; GX 31, 31A). In various conversations with acquaintances in Greenwood Lake, the Fords using the alias Thomas disclosed that they were originally from the Boston area (Tr. 735), that they had lived in Las Vegas (Tr. 717) * and in California (Tr. 717, 735),** that Mrs. Ford worked as a waitress at Jorgensen's restaurant in New Jersey (Tr. 696, 717, 736),*** and that, Richard Ford worked for a plumbing company that did a lot of work in Middletown (Tr. 716).****

As a plumber's helper for Charles J. Reid Plumbing Co., Ford using the alias Thomas, spent a great deal of time at the Village on the Green construction site in Middletown, 2.1 miles from the bank. (Tr. 844). Throughout the summer of 1971, Ford cashed his Wednesday payroll

* On February 24, 1970, Ford, then living under the alias of Joseph Michael Fitzgerald, married his wife Ellen (maiden name Dempsey) in Las Vegas. The marriage certificate was sent to their address at 1805 El Cerrito Place, Hollywood, California (Tr. 37-38; GX 101-03).

** Ford and his wife Ellen, living as the Fitzgeralds, resided at 1805 El Cerrito Place, Hollywood, California in late 1969 and early 1970. Their California drivers licenses contained their photographs (Tr. 39-41; GX 104, 105, 112).

*** Jorgensen's business records reflected that Natasha Thomas' last day of work was Friday, October 22, 1971, two days after the robbery (Tr. 749; GX 37).

**** The business records of Charles J. Reid Plumbing Co. (GX 36a, B, C, D1, D2, E) reflected that a Vincent Thomas worked for them as a plumber's helper from March, 1971 until October 22, 1971, his last day of work (Tr. 55-56; GX 36C, 36D2, 36E, 36F).

checks (GX 36E) at Lloyd's Department Store, across the street from the bank, where Ford had check cashing privileges (Tr. 53-54, 56, 756; GX 34, 34A). Ford's co-worker, John Petrie, testified that Ford frequently ate lunch at Lloyd's (Tr. 756) and that he, Petrie, frequently dropped Ford off on the way back from Middletown at the Pioneer Restaurant in Warwick, New York, where Natasha would meet Ford. (Tr. 752-53). The Pioneer Restaurant is located directly next door to the Stanley Chrysler and Plymouth Dealer from which the beige Plymouth was stolen. (Tr. 753, 755; GX 42A-E, 71-14).

6. The Western Union Money Order Connection

On October 12, 1971, eight days before the robbery, a fifty dollar Western Union money order was sent by James P. Flynn in Boston, Massachusetts, to Ellen Fitzgerald (the former alias of Ford's wife)* in care of the Western Union office in Suffern, New York (Tr. 46-47; GX 110, 111). Suffern is twenty-five minutes from Greenwood Lake by car. (Tr. 699-700).

7. The Fords' Final Week in Greenwood Lake

The employment records of Ford using the alias Vincent Thomas reflected that he worked (in Middletown) only four hours instead of his regular eight-hour shift on Tuesday, October 19, 1971, the day before the robbery (GX 36D1). He did not work at all on Wednesday, October 20th, the day of the robbery (GX 36D1). His final two days of work (GX 36D2) (both at job sites other than Middletown) were on October 21st and 22nd. (Tr. 55-56, 758-63; GX 36F).

* Ford and his wife were married in Las Vegas and lived in California under the names of Joseph and Ellen Fitzgerald (GX 101-105, 112; Tr. 37-41). See, *supra*, p. 8.

Having lived in the apartment above Sugar's Delicatessen for only six weeks, the Fords abruptly left the Greenwood Lake area a few days after the bank robbery,* leaving a great deal of clothing and furniture behind. (Tr. 51, 724-25). During the week preceding Ford's final departure from Greenwood Lake (that is, the week of the Middletown bank robbery), he had briefly left town, later explaining to a friend that he had been to Boston to look for a job. (Tr. 741).

8. The Cash Connection

In January, 1972, Flynn applied for a mortgage at the South Weymouth Savings Bank in Massachusetts for a \$27,000 home he was purchasing at 115 Hibiscus Avenue, Weymouth, Massachusetts. (Tr. 469-70, 477; GX 87A-H). At the real estate closing on March 20, 1972, in the offices of the bank's attorney, Flynn produced \$11,350 in cash in five, ten, twenty, fifty, and hundred dollar denominations. (Tr. 478, 481-94, 498-501; GX 88, 89). According to the financial statement Flynn had submitted to the bank on January 6, 1972, Flynn listed his total income as less than \$12,000 annually. (GX 87B). nually. (GX 87B).

9. Flynn's Flight, Fugitivity and Arrest

Co-defendant Richard Ford was not arrested until October 11, 1973. (Tr. 783-85).** Several months after

* Vincent Thomas (Ford) left town on Sunday, October 24th. His wife left on the following Tuesday, October 26th. (Tr. 723-24, 742-43).

** Ford was arrested in Chicago, Illinois by FBI agents as he attempted to escape from a fifth floor window by means of a rope ladder. Ford was living in Chicago at the time under the alias of John August. (Tr. 783-85).

Ford's arrest, on February 26, 1974, FBI agents Francis Joyce and Charles Riley called on Flynn at his home on Hibiscus Avenue in Weymouth, Massachusetts to serve a grand jury subpoena upon him returnable March 6, 1974 in the Southern District of New York. The agents told Flynn that they wanted to talk to him about a bank robbery in Middletown, New York and Flynn's presence in the Middletown area. Flynn who was not told about the discovery of his fingerprint in the "Robert P. Barry" room at the Holiday Inn, responded "you caught me unaware. I don't know what you're talking about." (Tr. 663-65, 671-72, 776-79).

Flynn appeared before the grand jury in New York at the designated time in early March, 1974, represented by attorney Ronald Chisholm who eventually represented Flynn at trial.* Flynn was advised that he was a suspect in the bank robbery and two days later complied with a direction by Judge Pollack to furnish hair exemplars for the purpose of laboratory comparison. (Tr. 442-47).**

The instant indictment was filed on April 3, 1974.*** Attorney Chisholm was immediately advised by telephone and notices were mailed promptly to Flynn instructing him to appear for arraignment on April 15, 1974. (Tr. 450-59; GX 48). Flynn failed to appear on that day and a bench warrant was issued. (Tr. 459-62).

* Chisholm had also represented Richard Ford at the September, 1975 trial. This fact was kept from the jury. (Tr. 451).

** The results of comparing Flynn's hair with the hairs obtained in the vacuum sweepings from the first getaway car used in the bank robbery ranged from negative to inconclusive. (Tr. 831-33; GX 45, 46).

*** It superseded a prior indictment which named defendant Ford alone. (Tr. 453).

In the month between his Grand Jury appearance and his failure to appear for arraignment, Flynn had abruptly left his job as a truck driver at Millis Transportation Company in Millis, Massachusetts (Tr. 621-31; GX 81) and dropped out of his union, Teamsters Local 25 (Tr. 654-62; GX 82). By April 17, 1974, when his home in Weymouth was searched by the FBI, Flynn had fled the area, leaving behind his wife and step-children. (Tr. 675-78, 780-82).

Flynn's first hide-out after becoming a fugitive was in Darien, Connecticut on the 19 acre estate of Fred Steinberg who met Flynn in the spring of 1974. (Tr. 638).^{*} Flynn stayed with Steinberg from April, 1974 thru early July, 1974. (Tr. 641-42). Carol Flynn, who knew from the FBI of the warrant outstanding for her husband (Tr. 676, 781-82), visited Flynn at Steinberg's estate twice during this period. (Tr. 642-44).^{**}

Flynn's whereabouts through 1975 were unknown but by 1976 he began living under the name Jim Harrigan as a bachelor in Bristol, New Hampshire. (Tr. 820-30). When arrested near Boston on February 14, 1977 Flynn was apparently returning from Boynton Beach, Florida where he had stayed for approximately one month in a condominium using the name James Harrigan or Harrington. (Tr. 787-98).

^{*} Steinberg had been in Boston in connection with the filming of the motion picture "The Friends of Eddie Coyle." He testified that he was introduced to Flynn by the operators of Chandler's restaurant in Boston who asked him as a favor to put Flynn up as a handyman on his estate. (Tr. 638-42).

^{**} Steinberg was first interviewed by the FBI in late August of 1974. (Tr. 645). In October of 1974, Flynn called Steinberg on the telephone, asked if the FBI had been looking for him, found out that they had been, mentioned something about his house being surrounded, and stated that he was "far away." (Tr. 646-47).

An automobile driven by one Murdo F. Margeson in which Flynn was a passenger was stopped by Massachusetts State Troopers on the Massachusetts Turnpike at 2:45 A.M. on February 14, 1977 because its front left headlight was out (Tr. 61-65). Flynn gave his correct name, date of birth and social security number to the troopers (Tr. 72-73). From an NCIC check, the troopers learned of the outstanding April 15, 1974 bank robbery warrant and placed Flynn under arrest. (Tr. 75-76). Flynn denied having any identification with him. (Tr. 71, 99). A wallet, however, was found under his passenger seat. (Tr. 85). It contained various identification in the name of John H. Chambers including two counterfeit driver's licenses in that name but with Flynn's own photograph affixed thereto (Tr. 90-95, 124; GX 83A, 83B, 85, 86, 87), and a third driver's license in Flynn's own name with an identical photograph affixed. (Tr. 96-97; GX 83C).*

In subsequent proceedings before the federal magistrate in Boston and the District Court in New York, Flynn claimed that he had not been aware that an indictment had been returned against him (Tr. 132, 806, 817-19) and he pretended that in the three year period since his indictment he had continued to work as a truck driver at Millis Transportation Company out of Teamsters Local 25. (Tr. 146-54; GX 206).

* When arrested, Flynn was in possession of a Greyhound bus ticket for a trip originating in Delray Beach, Florida (Tr. 121-22, 124, 766-75; GX 85, 91A, 91B) and had apparently been picked up by Margeson at the Greyhound bus terminal in Hartford, Connecticut shortly before the car was stopped (Tr. 121-25, 128-31, 136-37). Margeson, unbeknownst to the jury, himself had an extensive criminal record, including several bank robbery convictions. (GX 3591B Id.).

B. The Defense Case

The defense presented no evidence.

ARGUMENT

POINT I

The Evidence Was Sufficient To Establish Flynn's Possession of a Recently Stolen Car, and the District Court's Charge Was Correct.

On appeal Flynn attacks the sufficiency of the evidence that he knew the blue Plymouth was stolen, and he claims for the first time that a portion of Judge Motley's charge was incomplete. Neither claim has any merit.

Flynn contends that the evidence was insufficient to establish a violation of 18 U.S.C. § 2312—transportation in interstate commerce of a stolen car—because the evidence that he possessed the stolen blue Plymouth was itself not adequate to permit the inference of guilty knowledge stemming from the recent possession of stolen property.* This contention simply ignores the evidence.

* At no time does Flynn suggest that the inference relating to recent possession of stolen property is unconstitutional; any such claim would be to no avail. *Barnes v. United States*, 412 U.S. 837, 845-46 (1973). Flynn's claim is that the evidence was insufficient to show that Flynn possessed the stolen car. Nor as we explain later in the brief did Flynn offer any objection to the recent possession of stolen property charge given by Judge Motley. Specifically Flynn did not suggest that the charge should not be given because the evidence of Flynn's possession of the car was insufficient. See *infra* pp. 16-18.

The blue Plymouth was stolen from Logan Airport in Boston on October 18, 1971 (GX 71-11; A. 13). The fingerprints, license plates and telephone record evidence established that Flynn, who lived in the Boston area, arrived at the motel in Middletown, New York in the stolen car on that same night. Taking the evidence in the light most favorable to the Government,* Flynn and another individual registered at the motel hundreds of miles from Flynn's home several hours after the car was stolen car on that same night. Taking the evidence in registration card.** Telephone records showed that on the evening of October 18, 1971 telephone calls were made from the Holiday Inn in Middletown to Flynn's telephone number in Dorchester, Massachusetts, and the motel records revealed no instance in which Flynn registered in his own name at that motel during October, 1971. Flynn's fingerprint was found in motel Room 123, and the registration card for Room 123 for October 18, 1971 listed the stolen Plymouth including the exact license plate number as the car used by the individuals in the robbery. Flynn was also identified by Thomas McCoy as "resembling" the driver of the stolen car in the high school parking lot on October 20, 1971, just after the bank robbery. Based on this evidence the jury was entitled to conclude that Flynn knowingly possessed the car.

In connection with the proof that Flynn possessed a recently stolen automobile, Judge Motley gave a typical

* *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Amrep Corporation*, 560 F.2d 539, 543 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3436 (January 10, 1978); *United States v. Greenberg*, 534 F.2d 523, 524 (2d Cir.), cert. denied, 429 U.S. 831 (1976); *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 828 (1974).

** Later that same night, after Flynn's apparent rendezvous with Ford at the motel, the other stolen car used in the robbery—the beige Plymouth—was stolen in Warwick, New York, from a car dealership which co-defendant Ford was clearly familiar with.

charge on the inferences which can be drawn because of a defendant's possession of recently stolen property. Flynn contends that a portion of Judge Motley's charge on this subject was incomplete, and despite defense counsel's failure to object a new trial is required under the plain error doctrine. This contention is without merit.

During the Court's charge to the jury, Judge Motley gave a proper instruction on the inference a jury may draw from the recent possession of stolen property. (Tr. 1049-50). See *Barnes v. United States*, 412 U.S. 837, 845-46 (1973); *United States v. Brawer*, 482 F.2d 117, 129-30 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *United States v. Bollenbach*, 147 F.2d 199 (2d Cir. 1945), *rev'd on other grounds*, 326 U.S. 607 (1946). As part of this portion of the charge the District Judge made clear that the jury must understand that the defendant had a constitutional right not to take the stand and testify. In relevant part the Court stated:

"In considering whether possession of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional rights the defendant need not take the witness stand and testify. Possession, however, may be satisfactorily explained through other circumstances or other evidence already in the case independent of any testimony of the accused." (Tr. 1050).

The defendant for the first time on appeal claims that the "charge is fatally deficient in that it omits to instruct the jury that they may not consider the defendant's exercise of constitutional rights against him in the course of their deliberations." (Br. 9). The failure to object to the charge and to suggest that this additional language be added to the Court's charge not only constitutes a

waiver of the issue but also demonstrates conclusively that even defense counsel was satisfied that this charge amply protected his client's rights, and that the position Flynn now advances is a mere afterthought. It bears considerable emphasis that Flynn was represented at trial by the same attorney who represented his co-defendant Ford. Ford was tried before Flynn because Flynn was a fugitive. At Ford's trial Judge Motley basically gave the same charge given at Flynn's trial. Indeed the District Court informed defense counsel that she intended to give the same charge with certain additions applicable only to Flynn, and no objection was made. (Tr. 893-94). The portion of the charge Flynn now complains was incomplete was in the Ford charge. Thus, Flynn's trial counsel who had ample experience had the opportunity to hear the allegedly incomplete charge, and never even hinted at an objection.

Moreover, the charge given by Judge Motley was entirely proper. In *Barnes v. United States*, 412 U.S. 837 (1973) the Supreme Court upheld the constitutionality of the charge Judge Motley gave in this case. The Court held that the inferences to be drawn from recent possession of stolen property were constitutional, and that the instruction did not violate the defendant's constitutional right not to take the witness stand. The charge approved in *Barnes* contained the following language:

"In considering whether possession of recently stolen property has been satisfactorily explained,

* See *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 97 S. Ct. 2686 (1977); *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977); *United States v. Magnano*, 543 F.2d 431, 435-36 (2d Cir. 1976); *United States v. Dozier*, 522 F.2d 224, 228 (2d Cir. 1975); *United States v. Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966); Fed. R. Crim. P. 30, which explicitly provides that the failure to object to a portion of the charge or to an omission from the charge bars later assignment of error.

you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify.

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused."

Barnes v. United States, supra, 412 U.S. at 840, n.3.

This is the precise language used by Judge Motley, and nothing in *Barnes* which explicitly approves this language, 412 U.S. at 846, even remotely suggests that the failure to use the additional language Flynn now claims was necessary is error. It most assuredly cannot be plain error. Indeed it is absolutely clear that defendant's rights were fully protected by a charge which told the jury that in considering whether possession of the stolen property has been explained, they must understand that the defendant has a right not to testify, and that other evidence or circumstances in the case independent of the defendant may explain that the possession was innocent. No additional language was needed to protect the defendant's rights.

While Flynn never suggests that the conviction should be reversed because the prosecutor improperly commented upon Flynn's failure to testify, in arguing that Judge Motley's charge was defective he also intimates that the Assistant United States Attorney did comment on his failure to testify. (Br. 7-9). We briefly address this argument to dispel any notion that the prosecutor's summation was in any respect improper.

During summation and without objection, the prosecutor challenged the defense attorney to explain Flynn's fingerprint in the "Robert P. Barry" motel room in light of Flynn's February 1974 statement in which he denied being in Middletown and the telephone call made from

the motel in Middletown to Flynn's telephone in Massachusetts. The prosecutor further challenged defense counsel to explain the substantial cash Flynn had at the house closing a few months after the robbery. (Tr. 939-41). In rebuttal, after the defense attorney had made no references at all in summation to the \$11,350 in cash Flynn had used to buy the house shortly after the robbery, the prosecutor pointed out that no alternative theory had been suggested by the defense as to where Flynn could have gotten that much cash. (Tr. 1006). Defendant thereupon moved for a mistrial which was denied by the District Court on the ground that there were many possible explanations for the cash which might have been proffered without the defendant taking the stand. (Tr. 1006-08).*

The prosecutor's comment on the lack of a credible explanation by the defense as to the source of Flynn's funds was clearly proper. *United States v. Parness*, 503 F.2d 430, 437 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). The Government may properly comment on the defense's failure to contradict key evidence as long as the contradiction could come from witnesses other than the defendant. *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, 4530-32 (2d Cir. June 30, 1977). *United States v. Arredo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976); *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976); cf. *United States v. Lam Lek Chong*, 544 F.2d 58, 70 (2d Cir. 1976); *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1119 (2d Cir. 1975). The evidence relating to the \$11,350 in cash could have been innocently explained—if a truthful innocent explanation existed—by any number of people beside the defendant

* On appeal Flynn does not claim it was reversible error to deny the mistrial motion.

(i.e., the defendant's wife, a person who gave him the money as a loan or a gift, another employer or any number of other people).

POINT II

Flynn's Sentence Was Proper.

Flynn also contends that he was sentenced for committing crimes (bank robbery and use of a firearm) of which he was acquitted by the jury. There is nothing, however, in the sentencing minutes (A. 1-12) to support the claim. The consecutive sentences for conspiracy and the substantive Dyer Act violation were clearly proper. *United States v. Lord*, Dkt. No. 77-1157, slip op. 347 (2d Cir. Nov. 15, 1977); *United States v. Crosby*, 314 F.2d 654 (2d Cir. 1963).

The law is clear that absent reliance on materially incorrect information or on constitutionally impermissible facts, sentences imposed within the statutory maximum are not reviewable. *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Mejias*, 552 F.2d 435, 446 (2d Cir. 1977); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976); *United States v. Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Cf. *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976). The sentence imposed upon Flynn was within the statutory maximum.

Nor does the record suggest that Judge Motley relied upon materially incorrect information or impermissible factors. The sentencing minutes clearly show that this particular sentence was imposed because of Flynn's extensive criminal record and the seriousness of the charges he

was found guilty of committing. (Sent. Tr. 7-11). These factors were properly considered in imposing sentence.*

Indeed, even if the District Court had taken into account the charges upon which Flynn was acquitted this would have been proper. *United States v. Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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* See, e.g., *United States v. Cifarelli*, 401 F.2d 512, 514 (2d Cir.), cert. denied, 393 U.S. 987 (1968); *United States v. Needles*, 472 F.2d 652, 655 (2d Cir. 1973); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); *United States v. Doyle*, 348 F.2d 715 (2d Cir.), cert. denied, 328 U.S. 843 (1965); *United States v. Seijo*, *supra*.

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That on the *9th* day of *February*, 197*7*,
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Richard Weinberg

Sworn to before me this

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Qualified in Kings County
Commission Expires March 30, 1979